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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 586

STEWART BATA NASH, a minor, by JOSEPH TREADWAY NASH, his father as next friend,

Petitioner,

v.

N. V. NEDERLANDSCHE SCHOENEN-LEDERFABRIEKEN BATA-BEST, a corporation organized under the laws of the Netherlands,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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COMES NOW STEWART BATA NASH, a minor, by JOSEPH TREADWAY NASH, his father as next friend, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on the 20th day of May 1964 and the Order of the same 20th day of May 1964.

OPINION BELOW

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 20, 1964 without opinion. The text of the judgment is found in Appendix "A."

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of USCA 28: 1254(1). The United States Court of Appeals for the District of Columbia Circuit issued its judgment on this case on the 20th day of May 1964. By Order of this Court issued on the 29th day of July 1964 the time within which to file a petition for a Writ of Certiorari in this case was extended to October 17, 1964.

QUESTIONS PRESENTED

The following questions herewith are presented to this Court:

(a) Whether the U.S. Court of Appeals for the District of Columbia erred in sustaining the finding of the trial court that the assignment of property, held by the Department of Justice as a mere stakeholder, from Jan Bata, a friendly alien, to his grandson, Stewart Bata Nash, a United States citizen, was void and invalid; and

(b) Whether the U.S. Court of Appeals for the District of Columbia erred in failing to find that the regulations of the Attorney General, 13 Fed. Reg. 9508, 8 CFR 501-1, went beyond the statutory authority granted by Congress in Section 32(f) the Trading with the Enemy Act upon which such regulations were bottomed, or alternately, did not apply to that Section; and

(c) Whether the U.S. Court of Appeals for the District of Columbia erred in not acknowledging and drawing a legal distinction between Jan Bata, a recognized friendly alien, and the enemy aliens who are the proper subjects of proscription and interdict under the Trading with the Enemy Act; and

(d) Whether the denial by the trial court, later affirmed by the U.S. Court of Appeals for the District of Columbia, of petitioner's right to a trial on the merits with respect to the issue of property ownership deprived petitioner of due process of law; and

(e) Whether the U.S. Court of Appeals for the District of Columbia erred in not holding that petitioner, as an American citizen and in pursuance of a claim founded upon a voluntary irrevocable assignment from a friendly alien, was entitled to a trial upon the merits to determine ownership of the Forty-nine Thousand Six Hundred Forty-six Dollars and Seventy-two Cents ($49,646.72) in controversy; and

(f) Whether the U.S. Court of Appeals for the District of Columbia failed to take judicial notice of the treaty between the United States and Brazil proclaimed March 18, 1829 which provides, in pertinent part (Article 12) as follows:

> "Art. 12th. Both the contracting parties promise and engage formally to give their special protection to the persons and property of the citizens and subjects of each other, of all occupations who may be in their territories, subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial intercourse, on the same

terms which are usual and customary, with the natives or citizens and subjects of the country in which they may be; for which they may employ, in defense of their rights, such advocates, solicitors, notaries, agents, factors, as they may judge proper in all their trials at law."

8 Stat. 390, at 392.

STATUTES AND RULES INVOLVED

"The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than property or interest acquired by the United States prior to December 18, 1964), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; * * *"

Trading with the Enemy Act, Section 32(a), 50 USCA (Appendix) 32.

* * * *

(f) At least thirty (30) days before making any return to any person other than a resident of the United States or a corporation organized under the laws of the United States, or any State, Territory or possession thereof, or the District of Columbia, the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such re-

turn, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such notice of intention to return may be revoked by appropriate notice in the Federal Register. *After publication of such notice of intention, and prior to revocation thereof, the property or interest or proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United States or any corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, in the same manner as property of the person to whom return is to be made;* * * *" (Emphasis supplied)

supra, Section 32(f)

* * * *

"In any action at law in the United States District Court for the District of Columbia or the municipal court of said District, for the recovery of specific personal property, or a debt, or damages for the breach of a contract, express or implied, if the plaintiff, his agent or attorney, either at the commencement of the action or pending the same, shall file an affidavit showing the grounds of his claim and setting forth that the plaintiff has a just right to recover specific personal property stating the nature and, according to affiant's belief, the value of said property and the probable amount of damages to which the plaintiff is entitled for the detention thereof, and where the action is to recover a debt stating the amount thereof, and where the action is to recover damages for the breach of a contract setting out, specifically and in detail, the breach complained of and the actual damage resulting therefrom, and also stating either, first, that the defendant is a foreign corporation or is not a resident of

the District, or has been absent therefrom for at least six months; * * *"

District of Columbia Code (1961 ed.), Title 16-301

* * * *

"505.1 *Prohibition of transactions; applicability of regulations and licenses, etc.*

(a) The following transactions, transfers, or other dealings are prohibited, except to the extent that they are authorized by paragraph (b) of this section or are or shall be authorized by the Attorney General, or any agency, instrumentality, agent, delegate, assistant or other personnel, appointed or designated by him:

> (1) Transactions, transfers, or other dealings in or relating to any property or interest that has been vested, or as to which an outstanding supervisory order has been issued by the Attorney General or the Alien Property Custodian or the Office of Alien Property Custodian; * * *"

13 FR 9508, December 31, 1948, 8 CFR 505.1

STATEMENT OF THE CASE

Petitioner is a citizen of the United States and a resident of the State of Massachusetts. Petitioner is a minor and brought his action in the Court below as plaintiff through Joseph Treadway Nash, his father and next friend, a citizen of the United States and resident of Lexington, Massachusetts.

Respondent, N. W. Nederlandsche Schoenen-Lederfabrieken Bata-Best is a corporation organized under the laws of the Netherlands and has its principal place of business at Best in the Netherlands.

On the 20th of February 1963, the Attorney General of the United States, acting as the successor to the Alien Property Custodian under the Trading with the Enemy

Act, 50 USCA App. 1 *et sequitur* and more particularly under Section 32 of the Act, published in the Federal Register a Notice of Intention to make a return of property in the amount of $49,646.72 to petitioner.

The property aforementioned consists of funds deposited in various United States banks prior to the entry of the United States into World War II. During World II the Netherlands were occupied by Germany and, in consequence, this property became vested in the Attorney General of the United States as successor to the Alien Property Custodian by Vesting Order No. 17987 dated May 31, 1951.

On the 20th of February 1963, the lawful owner of all the funds hereinbefore described was Jan A. Bata, formerly a citizen of Czechoslovakia before World War II, but now a citizen of Brazil domiciled at Batatuba, State of São Paulo, Brazil.

Jan A. Bata, who is the grandfather of the petitioner, had placed the subject funds in the possession of the defendant corporation and directed their deposit in the Rotterdamsche Bank for ultimate deposit in the United States as part of a program and plan of difficult concept and hazardous execution to prevent these assets from falling into the hands of the German enemy and to make them available for the development of the Bata Shoe Enterprises in the United States and elsewhere in the free world.

Prior to the issuance on February 20, 1963 by the Justice Department of its Notice of Intention to Bata-Best to return the $49,646.72, Jan A. Bata who for many years had lived in Brazil, was unaware that respondent had advanced a claim for the money which he had deposited in the Rotterdamsche Bank.

On March 15, 1963 Jan A. Bata assigned, transferred and conveyed all right, title and interest to the described

funds held by the Attorney General to the petitioner, his grandson.

Jan A. Bata never has been an enemy of the United States, never has traded with an enemy of the United States, never has violated the Trading with the Enemy Act, 50 USCA App. 1 *et sequitur*, and at all times and upon every occasion without exception has been a friend of the United States and a vigorous supporter of the objectives of the United States in the free world. This posture he steadfastly maintained during and since the period when his native country Czechoslovakia was occupied by the German enemy, his shoe enterprises at Zlin, Czechoslovakia were seized and controlled by the German enemy forces and he was forced to flee before the Nazi onslaught.

Following the assignment latterly mentioned by Jan A. Bata to his grandson, the respondent corporation was notified by cablegram of the assignment to the petitioner, payment was demanded but no payment was forthcoming.

On March 19, 1963, petitioner, as a citizen of the United States, filed a Complaint in the United States Court for the District of Columbia alleging ownership of $49,646.72 claimed by respondent and challenging its right to have the vested funds returned to it. Immediately thereafter petitioner obtained a writ of attachment which was served upon the Attorney General of the United States and which since has operated to prevent the return of the subject funds to respondent.

This attachment was obtained pursuant to the specific provision of Section 32(f) of the Trading with the Enemy Act, *supra*, which provides that:

> "After publication of such notice of intention and prior to revocation thereof, the property or interest or proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United

> States or any corporation organized under the laws of the United States, or any State, Territory or possession thereof, or the District of Columbia, in the same manner as property of the person to whom return is to be made: *Provided,* That notice of any writ of attachment which may issue prior to return shall be served upon the alien property custodian."

Except for the restriction that suit must be at the instance of "any citizen or resident of the United States. . . ." it should be noted that this section of the Act, *supra,* is declaratory of the attachment before judgment provisions found in Title 16, Section 301, Code of the District of Columbia, which had their origin in 1901.

On June 21, 1963, respondent filed a motion to vacate and quash the attachment and dismissal of the Complaint. A hearing was had on this motion before the Honorable Joseph C. Garraghy, United States District Judge, on October 1, 1963.

At the close of the hearing the Court held that the assignment from Jan Bata to petitioner was void and invalid, that the complaint upon which the assignment was based did not state a cause of action, and that the Court was without jurisdiction to entertain the complaint. For the foregoing reasons the Court granted the motion to quash the attachment and to dismiss the complaint.

An order to the foregoing effect was entered on October 16, 1963 and a Notice of Appeal therefrom filed on November 12, 1963.

Following hearing and consideration the United States Court of Appeals for the District of Columbia Circuit on May 20, 1964 entered a judgment affirming the earlier judgment of the United States District Court for the District of Columbia.

CONTENTIONS IN SUPPORT OF PETITION

A. The Prohibition Against Assignment Or Transfer Of Vested Property Relates Solely To The Provisions Of Section 32 Of Trading With The Enemy Act Concerning The Return Of Property Seized By The Department Of Justice And Not To A Challenge To Such Return Under The Special Judicial Remedy Created In Subsection 32(f) Of The Act.

It pointedly must be made clear *ab initio* that we are not here concerned with the posture of the law affecting the administrative *return* of property, but, conversely, we rely upon the special statutory provision which creates and regulates the right to *challenge* such return of vested property to a claimant recognized by the Justice Department.

Petitioner is not seeking the return of property under Section 32(a) of the Trading with the Enemy Act. Quite to the contrary he is seeking to *prevent* the return to an unqualified claimant and, to effect this purpose, has resorted to an invocation of the special statutory remedy sanctioned by Section 32(f) of the Act.

Section 32(a) *et sequitur* of the Trading with the Enemy Act describes an administrative procedure for the return of property vested in or transferred to the Alien Property Custodian to qualified claimants. It provides in pertinent part that—

> "The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—
>
> (1) that the person who has filed a notice of claim for return, in such form as the President or such

> officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner: and * * *"

But petitioner is not a *claimant* under the quoted section of the Act. He is a *litigant* who filed a complaint against respondent, a non-resident corporation, located in the Netherlands, obtained service of process upon it by publication, and by resort to a special remedy created by Section 32(f) of the Act in favor of American citizens, attached the property held by the Department of Justice.

By contrast with its earlier sections, Section 32(f) of the Act provides an independent judicial procedure by which a person entertaining an adverse interest in property which the Alien Property Custodian has determined to return may come into Court and challenge the propriety of such action:

> "After publication of such notice of intention and prior to revocation thereof, the property or interest of proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United States or any corporation organized under the laws of the United States or any State, Territory or possession thereof, or the District of Columbia, in the same manner as property of the person to whom return is to be made: * * *"

In respect to the judicial right which it creates Section 32(f) stands entirely separate from Section 32(a). There is contained in Section 32(f) no language which imposes restrictions or qualifications upon the manner in which such citizen or resident of the United States has gained or acquired the right to enforce an attachment under this section. More specifically, this portion of the

statute lays down no barrier upon American citizens or residents who assert their property rights through the medium of the authorized attachment proceedings merely because such rights stem from an assignment by a friendly alien.

But to fully understand the purport of the attachment proceedings authorized in that section it must be pointed out that such authorization is in recognition of and declaratory of a provision of the District of Columbia Code that had its genesis in the Act of March 3, 1901, 31 Stat. 1258, D. C. Code, 16-301:

> "In any action at law in the United States District Court for the District of Columbia or the municipal court of said District, for the recovery of specific personal property, or a debt, or damages for the breach of a contract, express or implied, if the plaintiff, his agent or attorney, either at the commencement of the action or pending the same, shall file an affidavit showing the grounds of his claim and setting forth that the plaintiff has a just right to recover what is claimed in his declaration, and where the action is to recover specific personal property stating the nature and, according to affiant's belief, the value of said property and the probable amount of damages to which the plaintiff is entitled for the detention thereof, and where the action is to recover a debt stating the amount thereof, and where the action is to recover damages for the breach of a contract setting out, specifically and in detail, the breach complained of and the actual damage resulting therefrom, and also stating either, first, that the defendant is a foreign corporation or is not a resident of the District, or has been absent therefrom for at least six months; * * *"

The only material particular in which Section 32(f) alters the earlier and long standing provision of the D. C. Code relating to attachment before judgment is that the

former requires that the attachment be at the suit of "any citizen or resident of the United States or any corporation organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia, in the same manner as property of the person to whom return is to be made: * * *"

It thus is obvious that there exists a clear and well-defined line of demarcation between the administrative procedure governing the return of vested property by The Department of Justice to claimants under Section 32(a) of the Act and the statutory right to come into court under Section 32(f) of the Act to judicially resist the action of the Attorney General in making the return.

In respect to the former the claimant must have been the owner "of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative . . . or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; * * *" This language, coupled with the ancillary administrative regulation, 8 C.F.R. 505.1, operates to prohibit transfers or assignments of claims under the jurisdiction of the Justice Department.

But no such boundary circumscribes the action of a litigant proceeding to accomplish an attachment in pursuance of Section 32(f) of the Act and Title 16-301 of the D. C. Code. The sanctions for attachment before judgment contained therein impose no barrier based on the origin or derivation of the right which is sought to be enforced.

Thus it is irrefragable that an American citizen disputing in a United States Court the right of a claimant before the Justice Department to receive vested property is not barred from prosecuting his action at law merely because his right to proceed had its genesis in an assignment from a friendly alien.

B. The Departmental Regulations Implementing Section 32 Of The Trading With The Enemy Act Appertain Only To The *Return* Of Property Seized By The Department Of Justice.

Under the Trading with the Enemy Act the Department of Justice has issued regulations establishing administrative procedures and policies with respect thereto. 8 C.F.R. 501 *et sequitur.*

A review of these regulations discloses that they relate solely to the administration of enemy alien property controlled by the Department of Justice. Section 504 thereof appertains to vesting orders; Section 501 prescribes general rules of procedure before the Department; Section 502 sets forth a detailed and elaborate system for processing claims for the return of vested property; Section 511 controls blocked assets; and Section 507 governs patents, trademarks and copyrights.

More significantly for the purpose of this appeal Section 505 lays down certain restrictions and prohibitions governing transactions in the property of enemy aliens which has been vested in the Attorney General.

Specifically thereunder "Transactions, transfers, or other dealings in or relating to any property or interest that has been vested, ..., by the Attorney General . . ." are prohibited.

This section patently had its root in Section 32(a) of the Act which categorically defines and limits the conditions governing the return of vested property to claimants before the Department of Justice.

But nowhere in the regulations is there any reference to the attachment procedure authorized by Section 32(f) of the Act and Title 16-301 of the D. C. Code. This is because the latter statutory enactments establish a judicial remedy entirely beyond the periphery of the earlier sections of the Act and their dependent regulations.

C. Any Attempted Application Of The Administrative Regulations To Bar Or Restrict Petitioner's Judicial Remedy Sanctioned By Section 32(f) Of The Act, *supra*, Would Be Unsupportable And Void.

The trial Court below found that the "assignment in this case was void and invalid." To reach this conclusion the lower tribunal must have colorably found support in Section 32(a) of the Act or, more probably, in Section 505.1 of the noted departmental regulations which reads in pertinent part:

> "(a) The following transactions transfers, or other dealings are prohibited, except to the extent that they are authorized by paragraph (b) of this section or are or shall be authorized by the Attorney General, or any agency, instrumentality, agent, delegate, assistant or other personnel, appointed or designated by him:
>
> > 1. Transactions, transfers, or other dealings in or relating to any property or interest that has been vested, or as to which an outstanding supervisory order has been issued by the Attorney General or the Alien Property Custodian or the office of Alien Property Custodian; * * *"

Apparently the trial and appellate Courts held to the view that the assignment by Jan A. Bata to his infant grandson was a "transfer" of vested property within the regulatory prohibition.

This motion is egregious.

First, for the reason that the only thing assigned by Jan Bata to his American grandson was a valid and justiciable right to contest the return of the vested property unlawfully claimed by respondent.

Secondly, the assignment was made by a friendly alien to a United States citizen. The operative effect of the

Trading with the Enemy Act and its attendant regulations is confined to *enemy* aliens.

Third, neither petitioner nor his assignor, Jan A. Bata, is or has been a claimant before the Department of Justice in respect to the vested property petitioner now seeks in the United States Courts. Therefore, the departmental regulations concerning claims have no relevancy.

Fourth, an interpretation which would allow the quoted regulatory language to eviscerate the right granted under Section 32(f) to effect an attachment before judgment in aid to a civil action would stamp the regulation as void.

Obviously the regulation bears no reference to Section 32(f). Were it to be argued that the regulation applied to Section 32(f) then the regulation would be invalid because of its colorable attempt to create limitations and erect barriers not contemplated by the statutory language.

Before an administrative regulation has the force and effect of law it must comply with the requirement that the rule or regulation adopted must be within the authority of the agency and must have been adopted according to the procedure prescribed by the statute. The legislative Act is the charter of the administrative agency and administrative action beyond the authority conferred by the Statute is *ultra vires*. *Sutherland, Statutory Construction*, (3d Ed.) pp. 275, 276

> "If the delegation of rule-making is unconstitutional, the legislature in making it has acted ultra vires, and regulations issued in pursuance thereof are void. If the delegation is found to be constitutional, the *second requirement* is that the administrative authority act strictly in accord with its terms. Otherwise the administrative authority has acted ultra vires, and its regulations are void". *Hart, An Introduction to Administrative Law* (1940), p. 179

This rule judicially has been affirmed over the years so frequently as to give it axiomatic acceptance:

> "In the first place, every agency must conform precisely to the statute which grants the power. . . ." *State ex el. Wisconsin Inspection Bureau* vs *Whitman*, 196 Wis. 472, 220 N. W. 929 (1928).
>
> * * * *
>
> "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 320-322, 68 L. Ed. 1034 (1924); *Miller* v. *United States*, 294 U.S. 435, 439, 440, 79 L. Ed. 977 (1935) and cases cited.
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> * * * *
>
> "Not only must regulations, in order to be valid, be consistent with the statute but it must be reasonable." *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 80 L. Ed. 528 (1936)

The principle is summarized by Sutherland, *op. cit. supra*, in this manner:

> "In determining whether a particular regulation is beyond the power granted to an administrative agency, it is clear that the Court must not only examine the statute to determine the powers conferred, but also the regulation to determine whether the powers specified by it are fairly within the intendment of the statute". Section 4007

Even were there an ambiguity or conflict between the regulation and Section 32(f) of the Act, the latter would prevail. Inasmuch as the central legislative body is the source of an administrative agency's power, the provisions of the statute will prevail in any case of conflict between the statute and an agency regulation.

> *County of Los Angeles* v. *State Department of Public Health*, 158 Calif. App. (2nd) 425, 322 P.

(2nd) 968 (1958), *Walling* v. *Peavy—Wilson Lumber Co.*, 49 Fed Sup. 846, (1943); *United States* v. *Harp*, 80 Fed. Sup. 236 (1948); *Oddo* v. *Hedde*, 101 Calif. App. (2nd) 375, 225 P. (2nd) 929 (1951) *North Salt Lake* v. *St. Joseph Water and Irrigation Co.*, 118 Utah 600, 223 P. (2nd) 577 (1950)

The unobscured purpose of Section 32(f) of the Act, when read in conjunction with Title 16-301 of the D.C. Code, is to reinforce the action of an American citizen who contests the unlawful return of vested property in an adversary proceeding by allowing him to attach before judgment.

With their clear objectives no regulation validly may interfere:

> "Where the intention of the legislature is so apparent from the face of a statute there can be no question as to the meaning, there is no room for construction" *People ex rel Wood* v. *Sands*, 102 Calif. 12, 36 P. 404 (1894)

Actually the regulation, when measured by credible and acceptable standards, is found not to touch upon the grant of judicial power made by Congress in Section 32(f).

> "It is obvious, however, that inasmuch as a regulation is a written instrument, the general rules of interpretation of written instruments apply. Likewise, when the regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning." *Sutherland, op. cit. supra.* —— Section 4007

D. The Cardinal Purpose Of The Trading With The Enemy Act Is To Protect The United States Against Alien Enemies By Seizing And Holding Their Property Wherever Found. The Act Is Not Directed At Friend. Aliens Or United States Citizens.

The dominant objective of the Trading with the Enemy Act was to sequester the property of alien enemies and their nationals, so that such property could not be employed in the interest of any enemy government and against the interests of our own nation. *Oiehler* v. *Clark*, 170 F. (2) 779, 783.

This design was judicially recognized in *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656, 163 F (2) 913, cert-denied 333 U.S. 873.

> "This result is in accord with the well-settled public policy underlying the Trading with the Enemy Act that in time of war the government shall have the right to seize and sequester all property openly or secretly held in this country for the account of one who owes allegiance to and dwells within the territory of this country's enemies. The policy is not new. Its roots go back to Thirteenth Century English Law. Pollock and Maitland, History of English Law, 1st Ed., p. 445. It is a policy designed to cripple the enemy's commerce, to capture his property and to decrease his capacity for prolonging hostilities through the use of private resources."

and otherwise described in the following language:

> "The purpose of the Trading with the Enemy Act is . . . to harness all assets and property in this country belonging to enemy nations and their nationals, thus to prevent the possession, utilization and disposal thereof by such hostile powers and their nationals." *Brown* v. *J. P. Morgan & Co.*, 31 N. Y. S. (2) 815, 817, citing *Banco Mexicano de Comercio e Industria* v. *Deutsche Bank*, 53 App. D.C. 266, 289

F. 924, affirmed 263 U.S. 591, 44SS. Ct. 209, 68 L. Ed. 465.

The well-settled purpose of the Trading with the Enemy Act, *supra*, is that in time of war this government shall have the right to seize and sequester all property openly or secretly held in this country for the account of one who owes allegiance to and dwells within the territory of this country's enemies. Such policy is designed to cripple the enemy's commerce, to capture his property, and to decrease his capacity for prolonging hostilities through the use of private resources. *Standard Oil Co., N. J.* v. *Markham, supra, Clark* v. *Continental National Bank of Lincoln, Nebraska,* 88 F. Supp. 324.

It is patent that the Act and all regulations thereunder are for the benefit and protection of the United States.

The aim of the numerous safeguards found in Sec. 32 (a) of the Act is to protect the United States, acting through the Justice Department, against the subterfuges and clandestine maneuvers of enemy aliens who might seek to bring about the return to them of property held by the Alien Property Custodian.

The war ending in 1945 long ago has passed into history. After the lapse of many years the Justice Department has determined to return the sum of $49,646.72 to the claimant, Bata-Best. But pursuant to Section 32 (f) of the Act, an American citizen has come forward to contest the right of Bata-Best to receive this money. This intervention is authorized by Section 32 (f) in exact terms as follows:

> "After publication of such notice of intention (to return) and prior to revocation thereof, the property or interest or proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United States . . . in the same manner as property of the person to whom the return is to be made"

Thus American citizens claiming ownership may initiate attachment proceedings as a preliminary step to establish title to disputed property and, incidentally, prevent its removal from beyond the reach of the United States courts.

The decision of the Department of Justice to return to Bata-Best the property involved herein doubtless was reached only after mature and deliberate consideration. However, it was made without the knowledge that Jan A. Bata, a friendly alien, might have an adverse claim and might assign his claim to the petitioner, an American citizen. Undoubtedly, the attachment proceeding initiated by petitioner as assignee of Jan A. Bata altered the posture of the case insofar as the Justice Department might be concerned. But, thereupon being placed upon notice that the new claimant exercising his rights through the attachment provisions of Title 16, Sec. 301 of the D. C. Code based his claim on an assignment stemming from Jan Bata, it safely may be supposed that the Justice Department has taken reasonable steps during the year and six months intervening since the complaint was filed to assure itself that the property will not fall into the hands of an alien enemy.

In passing, it may be observed that under the sanction of Section 32(f) of the Act Jan Bata, although an alien, could have come to this country and availed himself of the same statutory remedy as a "resident" of the United States that his grandson is now employing as a citizen. Under that section there would be no barrier to action on the part of a resident, friendly alien. However, this observation is only of academic interest inasmuch as Jan Bata made an irrevocable assignment of his interest in the subject funds to his grandson.

It must be emphasized that all of the provisions of antecedent Section 32(a) of the Act relate to the deter-

mination by the Attorney General or the Alien Property Custodian that the person selected by him is entirely eligible to receive the property by return. Both the statute and the regulation make this unequivocably clear. However, here again the statutory and regulatory provisions are dedicated to the fundamental purpose of the Act which is to prevent the property from being returned to an alien *enemy* of the United States.

The absence of any allegation on the part of respondent that the assignor, Jan A. Bata, is, was or ever has been an enemy alien excludes the proposition that Jan A. Bata was one of the aliens against whom the proscription of the statute was intended to operate.

Moreover, the record in the case is completely lacking in any indication or even suggestion that the assignment from Jan A. Bata to Stewart Bata Nash was in any way a cloaking arrangement or anything other than an outright, irrevocable transfer of property from grandfather to grandson.

Reviewing the panoramic scope of decisions respecting the return of property seized by the Alien Property Custodian we find that the pivotal element affecting the original seizure in each case was that the owner of the sequestered property was an enemy alien. The statute in its whole broad effect is completely inoperative insofar as friendly aliens or their property may be concerned. *A fortiori* the statute does not remotely touch upon the rights of American claimant, unless they in turn, allegedly or in fact, have their claims bottomed upon vested property of an alien *enemy* seized by the United States.

Turning once again to the broad scope of Sec. 32 of the Trading with the Enemy Act, it is beyond dispute that it is aimed solely at alien enemies and does not impinge in any way upon the rights and liabilities of friendly aliens. This is true not only of the section of the

Act latterly mentioned but to all the other portions of the legislation as well.

The statute imposes no bar against litigants asserting a right under the statute stemming from an assignment. Plaintiff has brought his action, filed his writ of attachment and last March served notice thereof upon the Attorney General as successor to the Alien Property Custodian.

At this juncture the Attorney General has become a mere stakeholder of the property. By issuing his notice of intention to make return of the property, he apparently was satisfied in the absence of another claimant that Bata-Best was entitled to make claim for the property. But since March of 1963 the Attorney General officialy has been put on notice that a new litigant, the petitioner herein, asserts title to the property and that such contention of property ownership stems directly from assignments made by Jan Bata, a citizen of Brazil. (*Complaint, paragraphs 6 and 11, Exhibits "1" and "2".*)

E. The Assignment By Jan A. Bata Of Property Rights To His American Grandson Is Offensive Neither To The Letter Nor The Spirit Of The Trading With The Enemy Act.

By publishing on February 30, 1963 a notice of its intention to return the property herein involved, the Justice Department made clear its purpose to divest itself of such property and return it to Bata-Best, the only claimant before it.

The assignment patently is not barred either by the statute or its dependent regulation. The critical question, then, is whether the assignment is so flagrantly opposed to public policy as to warrant the court's action in refusing to sanction it.

For an understanding of this we must turn back to the Trading with the Enemy Act itself and look again to its stated purpose and the judicial interpretations thereunder hereinbefore cited.

Enemy aliens are the target of the Act. Friendly aliens and American citizens are not the focal points of its prohibitions.

The fundamental purpose of the Act cannot be subverted or distorted by an administrative regulation at variance with that purpose.

In The American Law Institute Restatement of Contracts are clearly set forth what rights may be effectively assigned:

> "A right may be the subject of effective assignment unless,
>
> * * * *
>
> "the assignment is forbidden by *statute* or by the policy of the common law, . . ." (Emphasis supplied.)

The Trading with the Enemy Act imposes no restriction upon an assignment of the type made without limitation or reservation by Jan Bata to his grandson.

Against this background we must give weight to the purpose of the Act in properly interpreting the meaning of Section 505.1 (a) of the Alien Property regulations.

Is the administrative proscription against assignments intended to apply to a friendly alien who at no time occupied a status contrary to the intendment of the Act eighteen years after the conclusion of hostilities?

It respectfully is submitted that the bar to assignments prescribed in Section 505.1 (a) is intended to operate solely against *enemy*-aliens. Moreover, it is not believed to be enforceable against or intended to encompass assignments made by a non-hostile alien to an American citizen

after the Justice Department had made a clear but erroneous decision, implemented by public notice, to return the vested property to the alleged owner.

The regulation, moreover, does not declare in any part that an assignment of the type contemplated therein is void, as was speciously concluded by respondent. Furthermore, were we to suppose, *arguendo*, that the assignment were *voidable*, the determination to declare it voidable would have to be measured by the basic purpose of the Trading with the Enemy Act which hereinbefore has been repeatedly made clear. When it is considered that the assignor is not alleged by any competent authority to be an enemy alien, then it is ineluctably clear that the assignment is neither void nor voidable.

The opening paragraph of the Report of the House Committee on the Judiciary on the then proposed amendment to the First War Powers Act of 1941 recites that:

> "The bill authorizes the President, or such officer or agency as he may designate, to restore property vested in or transferred to the Alien Property Custodian during World War II to persons who were never hostile to the United States." *H. R. Rep. No. 1269, 1946 U. S. Code Cong. Svc., p. 1101.*

The petitioner is not hostile to the United States, nor has he been opposed to the interest of the United States at any time. Jan Bata, the assignor, has never been hostile to the United States. There is no allegation in the record that either the claimant or Jan Bata is or has been an enemy alien.

The committee report, *supra*, makes clear that the suggested legislation would ban assignees who had bought claims from prosecuting them before the Justice Department and the courts:

> "The clause as to successors in interest excludes the possibility *of claims* being successfully made by assignees who have purchased the claim." *supra*, p. 1103

But an examination of the record discloses no averment or suggestion that the suit of Stewart Bata Nash, the grandson of Jan Bata and an American citizen, was purchased or otherwise obtained in a form contrary to law. A copy of the assignment irrevocably made by Jan Bata to the petitioner is in the record.

It should be noted that the amendment hereinbefore discussed was enacted into law on March 8, 1946, and became Section 32 of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411) as amended.

In contemplation of the facts that Jan Bata is not an alien enemy, has never traded with the enemy and always has been friendly to the United States, the property right which he has assigned to his blood relation does not come within the interdiction of the Trading with the Enemy Act or any regulation promulgated hereunder. To impose a limitation upon his right to transfer property to his American grandson would encroach upon freedom to contract and certainly be adverse to public policy as pronounced in the Act.

F. Plaintiff Resorted To The Correct Forum And Has Adopted The Appropriate Procedure For The Enforcement Of His Property Rights. To Deny Him A Trial On The Merits With Respect To The Issue Of Property Ownership Would Be To Deprive Him Due Process Of Law.

Petitioner's action is that of an American citizen against a foreign corporation having no domicile or resident agent within the District of Columbia or elsewhere in the United States.

Petitioner is able to avoid the inconvenience of going to the Netherlands or elsewhere out of his country to en-

force his legal rights against respondent only because of the authority contained in Section 32(f) of the Act coupled with the sanction of attachment before judgment proceedings embodied in the District of Columbia Code (*Title 16, Section 301 et sequitur*).

If petitioner is denied a hearing on the merits in this Court he must incur the hardship and expense of going to the Netherlands to seek a remedy.

This would be at variance with the established line of judicial decisions of this Court to the uniform effect that in a proceeding to recover property held by officers of the federal government the District Court has complete jurisdiction to assemble all the necessary parties for the purpose of establishing title to the property claimed.

The rule in this jurisdiction was clearly stated as early as 1905 in *Jones* v. *Rutherford*, 26 U. S. App. D.C. 114, 116:

> "The case before us, reduced to its ultimate analysis, is this: Two persons are claiming the same draft in the hands of the Treasurer, in which the United States have no longer any interest. The Treasurer, we may presume, is ready and willing to deliver it to the proper person. One of the two demands it because it is drawn in his favor, and he is the person ultimately entitled to receive the money. The other person demands it because, by reason of the convention between him and the other party, he is entitled to a lien upon it,—which means that he is entitled to receive and to hold it until a specified claim of his for compensation has been paid and satisfied.
>
> * * * *
>
> "The adverse claimants are both *sui juris* and may sue and be sued anywhere, . . . and the present custodian of the draft, the Treasurer of the United States, can properly be made amenable for the dis-

position of it only to the courts of the District of Columbia."

In *Doerschuck et al* v. *Mellon*, 60 App. D.C. 383, 55 F(2) 741, a case growing out of World War I, this Court held that a suit against the Secretary of the Treasury and a non-resident corporation not doing business within the District of Columbia to determine the right to a special fund deposited in the Federal Treasury, and to which the United States made no claim, lay within its jurisdiction.

Again in *Püger* v. *Sutherland*, 61 App. D.C. 84, ~~this~~ the Court held that in a suit against the Alien Property Custodian it had complete jurisdiction to assemble all necessary parties for purpose of determining title to property claimed. See also *Morgenthau et al* v. *Fidelity & Deposit Co. of Maryland*, 94F(2) 632.

The right of return under Section 32(a) of the Act is administrative and discretionary, and there is no right to review the judgment of the administrative authorities under that section, *Schill* v. *McGrath*, D.C.E.D.N.Y. (1950), 89 Fed. Supp. 339; *Von Henning* v. *Rogers*, D.C.D.C. (1960), 187 F. Supp. 914, affirmed 111 U.S. App.D.C. 298, 296 F (2) 420, rehearing denied, 82 Sup. Ct. 950, 369 U.S. 859, 8 L. Ed. (2d) 18.

But it again is pointed out that petitioner is not an administrative claimant seeking return of vested property held by the Department of Justice. Instead he is an American citizen who has filed an action at law to prevent his property from being removed from the United States. In aid of this objective he has resorted to the attachment before judgment provisions contained in Title 16-301 of the D. C. Code and especially implemented by Section 32 (f) of the Trading With the Enemy Act to restrain the removal of the funds in controversy.

If petitioner is not granted his day in court to determine the issue of property then, in effect, he will be denied effective access to the courts and substantially deprived of due process of law.

G. The Fundamental And Only Issue In This Case Is That Of Property Ownership. The Questions Of Public Policy And Validity Of The Assignment Have Been Raised Solely To Becloud The Issue.

The object of inquiry in this case is not whether the assignment is barred by regulation (although categorically it is not barred by statute) or whether the assignment is opposed to public policy.

The elementary question in this case is who owns the property.

Congress has provided under the Trading with the Enemy Act and under the District of Columbia Code a procedure by which lawful ownership of disputed property may be judicially determined by a trial on the merits in this Court. Petitioner has followed every step of the statutory procedure required to accomplish this purpose.

CONCLUSION

WHEREFORE, it respectfully is submitted that the assignment from Jan Bata, a non-hostile alien, to his grandson, an American citizen, was not invalid or forbidden by law, is not contrary to public policy, and was in all respects valid and proper. It further is urged that petitioner's attachment was an appropriate exercise of a judicial remedy specifically created by Congress to prevent the removal beyond the jurisdiction of this Court of property lawfully claimed by a United States citizen.

STASSEN, KEPHART, SARKIS & SCULLIN

By.....
HAROLD E. STASSEN

and

.....
JOHN ALVIN CROGHAN
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition was this —— day of October, 1964 delivered to J. Roger Wollenberg, counsel for respondent at his office, 900 17th Street, N. W., Washington, D. C.

.....
JOHN ALVIN CROGHAN
Counsel for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963.

Civil 723-63

No. 18,282

STEWART BATA NASH, a minor, by JOSEPH TREADWAY NASH, his father as next friend,
Appellant,

v.

N. V. NEDERLANDSCHE SCHOEN-EN LEDERFABRIEKEN BATA-BEST, a corporation organized under the laws of the Netherlands,
Appellee.

United States Court of Appeals
for the District of Columbia Circuit

Filed May 20, 1964

/s/ Nathan J. Paulson, Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton and Prettyman, Senior Circuit Judges, and Wright, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment ..... of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the court that appellee herein recover from appellant its taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: May 20, 1964